Refugees and the Immigration Act

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Introduction

Unprecedented in the history of Canadian immigration legislation, the recent *Immigration Act, 1976*[1] has attempted to codify the procedures dealing with the entrance of individual refugees to Canada. In essence, there is no significant difference from departmental administrative practice under the old statute; however, now that the procedures and standards are precisely articulated, they may be examined more extensively. This article will outline the immigration system established to process refugee claims, and will comment on the legislative steps Parliament has taken to ensure that Canada meets her international obligations and provides a system whereby the individual refugee applicant is treated with procedural and substantive fairness.

It is important at the outset to differentiate between the situation of the immigrant and that of the refugee. Immigrants voluntarily choose to relocate, generally with a view to self-improvement and achieving a higher quality of life for themselves and their families. Economic considerations are the most frequent motivating factors. In contrast, the refugee, while exhibiting many characteristics of the ordinary immigrant, has little choice in the decision to migrate. Simply stated, refugee migration consists of:

> the movement of people on an involuntary, forced basis ... but it has not been planned, organized, or participated in by individuals or groups of individuals for their own preferred reasons. Refugee exodus, by individuals or groups, is forced, sudden, chaotic, generally terror-stricken, and at least initially productive of social and psychological disruption.[2]

It is precisely because of the involuntary uprooting of refugees from their habitual residence that different standards and procedures must exist in immigration law to accommodate their applications. Admission criteria should emphasize humanitarian rather than economic concerns.

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[1] S.C. 1976-77, c. 52.

[2] Bernard, *Immigrants and Refugees: Their Similarities, Differences, and Needs* (1976) 14 Int'l Migration 267, 267-68.

In addition, the international impact of refugee migration must be stressed. Refugee migration has received significant attention from the international community and its institutions, in contrast to the international legal approach to ordinary immigrant migration — long considered an element of state sovereignty subject to domestic standards only.[3] While there may be some exceptions to this general rule[4] as well as a growing awareness of individual human rights in the international community,[5] it is mainly in the area of refugee admission that international law has any impact on domestic immigration schemes. It is within this frame of reference that the *Immigration Act, 1976* and admission of refugees to Canada should be examined. The main focus must be on whether the processing of refugees demonstrates a high regard for the humanitarian elements in each case, and whether Canada's legislative directives measure up to international standards designed to ensure the refugee's welfare. In no other area of immigration law is the simple ability to move portrayed so vividly as an element vital to existence. The history of refugee migration has shown that it is a highly political question; Canada's new Act has demonstrated that it may also be a complex legal issue.

I. The international standard

Recent international legal history with respect to refugees began with the Convention Relating to the Status of Refugees, signed in Geneva in 1951.[6] The Convention was designed to regularize and consolidate treatment in the context of the post World War II

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[3] See generally Goodwin-Gill, *The Limits of the Power of Expulsion in Public International Law* (1974-75) 47 Brit. Y.B. Int'l L. 55 and Brownlie, *Principles of Public International Law* (1973), 505. The rights regarding admission, naturalization and expulsion are not circumscribed by international law, but analysis of state practice can establish some standards of reference, and physical presence alone may be enough to require non-discriminatory treatment.

[4] See Roth, *The Minimum Standard of International Law Applied to Aliens* (1949), 32: "The State of residence has to concede a certain minimum of rights to the alien and its power to control him is restricted to a certain maximum". Also see Dawson & Head, *International Law National Tribunals and the Rights of Aliens* (1971).

[5] See, *e.g.*, McDougal, Lasswell & Chan, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights* (1976) 70 Am. J. Int'l L. 432 and Fischer, *The Human Rights Covenants and Canadian Law* (1977) 15 Can. Y.B. Int'l L. 42.

[6] 189 U.N.T.S. 150.

refugee problem.[7] This general enactment was significant in being the first international treaty to offer a legal definition of "refugee" and to define fundamental rights and principles.[8] Its primary goal was to repatriate refugees to their home countries or to help them resettle elsewhere.

A major defect in the 1951 Convention was its applicability only to persons who became refugees *prior* to 1951. This time limitation, among other things, was removed by the 1967 Protocol relating to the Status of Refugees.[9] Although not an original party to either agreement, Canada acceded to both in 1969. However, because of Canada's constitutional requirements, neither the Convention nor the Protocol can be considered part of domestic law without federal legislation designed specifically for that purpose.[10] The extent of Canada's accession to the substantive provisions contained in the relevant treaties, apart from international obligations, must be gleaned solely from an analysis of the *Immigration Act, 1976.*

The Convention does not attempt to change the customary rule of international law that no individual, including a refugee, may assert a right to enter a state unless he is a national of the receiving country. It is the right of a state to grant asylum, not the right of the individual to be granted asylum. The principal protection offered refugees by the Convention is the prohibition against *refoulement* — the return of a refugee "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".[11]

However, since an exception is made for refugees who are considered to be security risks by the host country, avoidance of the

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[7] A number of different treaties and organizations had dealt with the problem after the First World War.

[8] See Hill, *Immigration Law and the Refugee — A Recommendation to Harmonize the Statutes with The Treaties* (1975) 6 Calif. W. Int'l L.J. 129, 132 and Weis, *The United Nations Declaration on Territorial Asylum* (1969) 7 Can. Y.B. Int'l L. 92, 122.

[9] 606 U.N.T.S. 267.

[10] This assumes that the *Labour Conventions* case [1937] A.C. 326, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299 (P.C.) still portrays an accurate constitutional picture of the treaty power in light of comments made by Laskin C.J.C. in *Macdonald* v. *Vapour Canada Ltd* (1976) 66 D.L.R. (3d) 1, 27 *et seq.* (S.C.C.). See also Macdonald, "The Relationship Between International Law and Domestic Law in Canada" in Macdonald, Morris & Johnston (eds.), *Canadian Perspectives on International Law and Organization* (1974), 88.

[11] 189 U.N.T.S. 150, Art. 33. Note the exception in Art. 33(2) in the case of security risks. See also Plender, *International Migration Law* (1972), 239-42.

refoulement provision is possible. This is especially true with regard to refugees from countries on friendly terms with Canada, the implication being that accepting refugees from other Western nations would indicate tacit disapproval of their domestic policies and would result in a potentially embarrassing situation.[12] In addition to the prohibition against *refoulement,* refugees are not to be expelled to other countries except in accordance with due process of law.[13]

The remaining sections of the Convention deal with the rights and privileges of refugees already present within the receiving state. Domestic treatment of refugees must in all cases be equal to that accorded other aliens by the domestic law and in some cases is required to be equivalent to the status enjoyed by nationals.[14] Some of the subjects treated are religion,[15] personal status,[16] property,[17] association,[18] access to courts,[19] gainful employment,[20] welfare,[21] and administrative measures including the right to freedom of movement and issuance of travel documents.[22] Finally, Article III of the 1967 Protocol requires that each contracting party communicate to the Secretary General of the United Nations the laws and regulations which have been adopted to ensure that domestic treatment of refugees is consistent with the standards of the Convention and Protocol.[23]

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[12] This is not a legal but a political problem. See Oda, "The Individual in International Law" in Sorensen (ed.), *Manual of Public International Law* (1968), 469, 491: "Grant of asylum to ... political refugees is a peaceful and humanitarian act and so it cannot be regarded as unfriendly by any other state including the state of which ... the refugee is a national". Generally, see Weis, *Human Rights and Refugees* (1972) 10 Int'l Migration 20.

[13] 189 U.N.T.S. 150, Art. 32(2).

[14] *Ibid.*, Art. 7.

[15] *Ibid.*, Art. 4.

[16] *Ibid.*, Art. 12.

[17] *Ibid.*, Arts. 13 and 14. Art. 13 stipulates treatment "not less favourable than that accorded to aliens generally".

[18] *Ibid.*, Art. 15, which grants the same rights "as a foreign national".

[19] *Ibid.*, Art. 16.

[20] *Ibid.*, Arts. 17 (treatment equivalent to that accorded foreign nationals) and 19 (treatment equivalent to that accorded aliens generally).

[21] *Ibid.*, Arts. 20-24.

[22] *Ibid.*, Arts. 25-31.

[23] 606 U.N.T.S. 267, Art. III. For a general analysis of the treatment of aliens in Canada, see Head, *The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada* (1964) 2 Can. Y.B. Int'l L. 107; on property rights, see Spencer, *The Alien Landowner in Canada* (1973) 51 Can. Bar Rev. 389. No study has been undertaken to determine Canada's compliance with the Convention provisions. The only area of law other than

As may be observed, no provision in either of the relevant treaties gives refugees the right to enter the territory of one of the contracting states. It is only after the refugee enters the territory of the state of refuge that any rights accrue.[24] The most significant impact of the treaties on Canadian domestic jurisdiction has been the definition of the term "refugee" which has been incorporated in the *Immigration Act, 1976.* A refugee is defined as any person who,

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it.[25]

This definition has presented many difficulties of interpretation on both international and domestic levels.[26] It has been estimated that fifty per cent of the world's *de facto* refugee population is presently excluded from the mandate of the United Nations High Commissioner for Refugees, the principal international functionary

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immigration in which the status of refugees is raised is in the family law field. Questions such as whether refugees can acquire a "domicile of choice" or have a "real and substantial connection" with a court of competent jurisdiction for purposes of divorce recognition have been raised in the past. See, *e.g., Osvath-Latkoczy* v. *Osvath-Latkoczy* [1959] S.C.R. 751 and *Holub* v. *Holub* (1976) 71 D.L.R. (3d) 698 (Man. C.A.).

[24] Exactly what constitutes a presence within the territory sufficient to attract the protection of the Convention has caused much difficulty in the U.S. Many cases have held that physical presence is not enough; compliance with the immigration statutes is also necessary. See Mackler & Weeks, *The Fleeing Political Refugee's Final Hurdle — The Immigration and Nationality Act* (1978) 5 N. Ky L. Rev. 9. Although Art. 31 of the Convention makes some provision for refugees *unlawfully* in the country of refuge, and Art. 32 speaks of expulsion of refugees *lawfully* in the country of refuge, Canadian laws do not seem to make this distinction. Indeed, in the U.S., the anomaly has arisen that illegal entrants might receive more procedural protection in removal proceedings than refugees who were initially admitted in a lawful manner. See also Clowney, *Extending the Constitution to Refugee-Parolees* (1977) 15 San Diego L. Rev. 139.

[25] 189 U.N.T.S. 150, Art. 1A.

[26] For the limitations apparent in the Convention itself, see *ibid.*, Art. 1C. Domestically, limitations inherent in the definition have posed difficulties for Canadian courts: see *Darwich* v. *M.M.I.* [1979] 1 F.C. 365, 25 N.R. 462 (C.A.). Mr Darwich was an individual who fled a civil war in his country. This was not found to be persecution sufficient to comply with the refugee definition.

charged with assisting refugees.[27] The present definition and its failure to deal effectively with the refugee dilemma was one of the motivating factors for a new convention on territorial asylum — the subject of a 1977 Geneva Conference.[28] This convention would attempt to extend the present definition to include refugees who are excluded under the existing framework.

II. Statutory provisions related to refugee status

Although the 1966 White Paper on Immigration had promised legislative amendments to deal with the problem of admission of refugees to Canada, no comprehensive legal criteria appeared before the new Act in 1976.[29] White Paper proposals did encourage accession to the various international treaties dealing with refugees and recommended the establishment of a Refugee Eligibility Committee. In response, Canada acceded to the treaties in 1969, and the Refugee Eligibility Committee, although never recognized in law, attained a form of existence in the establishment of an interdepartmental advisory committee on refugee status.[30] Favourable review by the Committee could result in the granting of landed immigrant status by Order in Council.[31]

The first statutory recognition of a refugee's legal right to remain in Canada appeared in an amendment to the *Immigration Appeal Board Act* in 1973.[32] Persons claiming to be refugees protected by the Convention were given a qualified right of appeal from an order of deportation issued by a Special Inquiry Officer.[33] If the claim was viewed as neither frivolous nor likely to fail at a preliminary hearing, leave to appeal was granted and the refugee claimant had access to the Board's equitable jurisdiction under section 15 of the *Immigration Appeal Board Act*. The successful

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[27] UNHCR, *The Refugee Problem Isn't Hopeless Unless You Think So* (1975); Plender, *Admission of Refugees: Draft Convention on Territorial Asylum* (1977) 15 San Diego L. Rev. 45.

[28] See Plender, *supra*, note 27, 56-60.

[29] Dept of Manpower and Immigration, *White Paper on Immigration* (1966), 23. On the new Act as a whole, see Black, *Novel Features of the Immigration Act, 1976* (1978) 56 Can. Bar Rev. 561.

[30] Government of Canada, *Green Paper on Immigration Policy* (1975), vol. 2, 115.

[31] Canada Law Reform Commission, *The Immigration Appeal Board* (1976), 49.

[32] *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, s. 11 as am. by S.C. 1973, c. 27, s. 5.

[33] S.C. 1973, c. 27, s. 11(1)(c).

appellant could then be granted landed immigrant status by the Board, despite the existence of a deportation order and rejection by the Interdepartmental Advisory Committee. This appellate procedure, however, was the only means of seeking refugee status recognized by statute. Special Inquiry Officers had no jurisdiction to consider such claims when adjudicating on deportation orders; they could only relay information to the Interdepartmental Advisory Committee. As pointed out in an article by Grey, "[i]t was, to say the least, a strange phenomenon that a ground which could not, in strict law, be invoked at a special inquiry suddenly became the legitimate basis for an appeal from that inquiry".[34] It was by this confused method that Canada sought to fulfil her international obligations.

The *Immigration Act, 1976* is much more specific about procedures relating to refugee status, although the relevant provisions are scattered throughout the statute and give an appearance of confusion. Section 2(1) adopts as the appropriate test for admissibility the Geneva Convention definition of "refugee". Since an individual claiming refugee status within Canada will be involved eventually in a process of removal, either at a port of entry or after admission as a visitor, the procedure for dealing with the claim does not begin until the inquiry stage. There is no method of requesting refugee status without subjecting the claimant to possible removal from Canada.[35] When the inquiry is held, the subject must claim protection as a Convention refugee. No determination of refugee status will occur at this time; the inquiry will be continued to determine if there are legitimate grounds of exclusion and removal apart from the refugee claim. If such appears to be the case, the inquiry will be adjourned.[36]

Upon adjournment, the claimant will be examined by a senior immigration officer and will be allowed to submit his own evidence

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[34] Grey, *The New Immigration Law: A Technical Analysis* (1978) 10 Ottawa L. Rev. 103, 106.

[35] Under the former legislation, a deportation order had to be made before the refugee claim could be processed, and in order to appeal to the Immigration Appeal Board. The new law advances the process somewhat, in that the refugee claim can be processed before issuance of a deportation order; however, if the claim is rejected, removal will be the ultimate result.

[36] S.C. 1976-77, c. 52, s. 45(1). If no grounds for removal are apparent, the subject of the inquiry will obviously have no reason to pursue the refugee claim. However, there may be tactical reasons why a claimant may not wish to subject himself to removal proceedings in order to lodge a refugee claim.

as to the substance of the refugee claim.[37] After completion of the examination under oath and submission of any supporting evidence, all relevant materials will be referred to the Minister.[38] It is important to note that the adjudicator is given no discretion in dealing with claims for refugee status; the above procedure is mandatory.[39] In addition, the subject of the examination is entitled to be represented by counsel and given a reasonable opportunity to obtain counsel,[40] and may obtain a copy of the transcript of the examination.[41]

Upon receipt of the claim and transcript, the Minister shall refer the evidence to the members of the Refugee Status Advisory Committee[42] appointed by him to assist in determining whether or not the claimant is a Convention refugee.[43] While the Committee may advise and make recommendations, the Minister has sole responsibility for a final determination. The claimant has no right to submit further evidence, make a personal appearance, request a hearing, or ask for reasons for the decision.[44]

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[37] It is best for counsel to have a statement concerning the evidence relating to the refugee status claim prepared in advance of the inquiry. It is very important that all possible evidence be entered on the transcript in order to allow the Advisory Committee the widest scope for appraisal.

[38] S.C. 1976-77, c. 52, s. 45(2).

[39] *Ibid.*, s. 45(1). Note the wording: "*shall* be adjourned" [emphasis added].

[40] *Ibid.*, s. 45(6).

[41] *Ibid.*, s. 45(3).

[42] *Ibid.*, s. 45(4).

[43] *Ibid.*, s. 48. Recent appointments to the committee indicate a departure from past practice, as members of the public as well as government officials have been named. Current appointments include a former Moderator of the United Church of Canada, the Director of the Canadian Branch of the International Labour Office, a former Executive Director of the Ottawa Social Planning Council, a former Assistant Under-Secretary of State for External Affairs and Canadian ambassador, as well as two representatives of the Employment and Immigration Commission, an official of the Department of External Affairs and the representative in Canada of the United Nations High Commissioner for Refugees who attends as an observer and adviser: Press Release 78-19, Minister of Employment and Immigration, Apr. 10, 1978.

[44] *Quaere* whether or not proceedings before the Refugee Status Advisory Committee may be reviewable under the *Federal Court Act*, R.S.C. 1970, c. 10 (2d Supp.), now that the Committee and its powers are recognized by statute and it has a defined standard to apply to each individual case. The nature of the Committee's function (to investigate or recommend) and the characterization of immigration law as involving "privileges" rather than "rights" would seem to detract from this possibility. More contentious questions on non-reviewability arise in relation to the Special Advisory Board dealing with security cases established by *Immigration Act, 1976*, ss. 39-42. At least the refugee claimant may receive a second chance at a public

If the Minister determines that the claimant is a Convention refugee, the senior immigration officer who conducted the original examination and the claimant will be informed of this determination.[45] If a negative determination as to refugee status is made, the original inquiry will be resumed and the appropriate removal order or departure notice will be issued.[46] However, resumption of the inquiry may be delayed if the claimant makes an application to the Immigration Appeal Board for a redetermination of his claim as a Convention refugee.[47]

The procedure established for disposition of the refugee claim on an application for redetermination is very similar to the procedure for qualified appeals under the previous *Immigration Appeal Board Act*.[48] The claimant must attach to his application for redetermination a declaration made under oath, containing: a) the nature of the basis of the application; b) a reasonably detailed statement of the facts on which the application is based; c) a summary in reasonable detail of the information and evidence intended to be offered at the hearing; and d) such other representations as the applicant deems relevant to the application.[49]

The application for redetermination cannot proceed directly to a hearing on the issue of refugee status. On the basis of the transcript of the original inquiry examination and the additional evidence submitted by the applicant outlined above, the Board must initially determine whether "there are reasonable grounds to

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hearing before the Immigration Appeal Board. Individuals who are considered security threats may be deported without the opportunity to defend themselves or even to know the particulars of the case against them. See, *e.g., Prata* v. *M.M.I.* (1975) 52 D.L.R. (3d) 383 (S.C.C.). Generally see Hucker, *Immigration, Natural Justice and the Bill of Rights* (1975) 13 Osgoode Hall L.J. 649. An attempt to require the Refugee Status Advisory Committee to allow the claimant some access to its proceedings and reasons was undertaken in *Perez* v. *Refugee Status Advisory Committee*, F.C.T.D., No. T-3857-78, Aug. 29, 1979 (unreported). Smith D.J. denied a defence motion to strike for lack of reasonable cause of action; the case is still to be heard on the merits.

[45] S.C. 1976-77, c. 52, s. 45(5).

[46] *Ibid.*, s. 46(1).

[47] *Ibid.*, s. 70(1). By s. 40 of the *Immigration Regulations, 1978*, SOR/78-172 (1978) 112 Canada Gazette Pt II 757, a request for redetermination by the Immigration Appeal Board must be made by the claimant within seven days of being informed of the Minister's refusal to accept refugee status. This period of time seems unduly onerous as recent case law has suggested that all supporting documents must accompany the request: *Tapia* v. *M.E.I.* (1979) 26 N.R. 361 (F.C.A.).

[48] R.S.C. 1970, c. I-3, s. 11, as am. by S.C. 1973, c. 27, s. 5.

[49] S.C. 1976-77, c. 52, s. 70(2).

believe that the claim could ... be established" if a full hearing were allowed.[50] Rejection of the application at this preliminary stage will result in a determination that the applicant is not a Convention refugee. If the application is allowed to proceed, a complete hearing on the issue will be held and the Minister's representatives will be permitted to attend.[51] Whatever the outcome, all parties to the disposition are entitled to be informed of the Board's decision and reasons for the determination will be available upon request.[52]

Up to this point the potential refugee may have had two fora review his claim. Whatever the result of the Minister's or the Appeal Board's determination, the claim will be referred back to an adjudicator for resumption of the original inquiry. If the outcome has been negative, the appropriate removal order or departure notice will then be issued.[53] It is significant, however, that at this stage most refugee claimants have no right of appeal from the adjudicator's decision to issue a removal order.[54] Eligible *appellants* no longer include refugee *claimants*. Since a refugee status *redetermination* is not an *appeal*, claimants will not have access to the Board's equitable or humanitarian jurisdiction if their application for redetermination is refused. Unsuccessful refugee claimants had this privilege, according to interpretation of the former legislation.[55]

The most controversial, and certainly the most cumbersome, feature of the new legislation is the fact that inquiries must be resumed notwithstanding a favourable decision for the applicant by

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[50] *Ibid.*, s. 71(1). This procedure is reproduced from the former statute.

[51] *Immigration Appeal Board Rules, 1978*, SOR/78-311 (1978) 112 Canada Gazette Pt II 1422, as am. by SOR/78-355 (1978) 112 Canada Gazette Pt II 1970, s. 53, enacted pursuant to the *Immigration Act, 1976*, S.C. 1976-77, c. 52, s. 67. See also s. 71(2) of the Act.

[52] S.C. 1976-77, c. 52, s. 71(3) and (4). If the Board allows the application to proceed, in most cases the applicant will be successful. Since the Board is a creature of civil rather than criminal jurisdiction, the standard of proof rests on a balance of probabilities. Since the test established by s. 71(1) for allowing the application to proceed is stated as "reasonable grounds to believe that a claim could ... be established", the applicant must have already proven most, if not all, of his claim by the time the full hearing is to be conducted.

[53] *Ibid.*, s. 46. It appears that the adjudicator has no discretion in this regard. Note the word "shall" in s. 46(2).

[54] The possibility of judicial review of the adjudicator's decision by the Federal Court is evident at this stage. See the case of *Tapia* v. *M.E.I.*, *supra*, note 47, where judicial review of the Board's refusal was undertaken.

[55] Grey, *supra*, note 34, 107: "This will in practice eliminate a very significant avenue of appeal".

the Minister or the Immigration Appeal Board.[56] Classification as a Convention refugee is no guarantee of a right to remain in Canada. Final clearance must be obtained by an adjudicator at the resumed inquiry who will apply certain final tests of admissibility to determine whether the now adjudged Convention refugee presents any threat to the security or public order of Canada.[57] In addition, Convention refugees convicted of an offence under any federal statute for which a term of imprisonment of more than six months has been imposed are eligible for rejection.[58] The general intent of this process is to indicate that refugees are not subject to the same scrutiny as ordinary immigrants.

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[56] S.C. 1976-77, c. 52, s. 47.

[57] *Ibid.*, s. 4(2), read with ss. 19(1)(c)-(g), 27(1)(c)-(d), and 27(2)(c):

s. 19(1)

(c) persons who have been convicted of an offence that, if committed in Canada, constitutes or, if committed outside Canada, would constitute an offence that may be punishable under any Act of Parliament and for which a maximum term of imprisonment of ten years or more may be imposed, except persons who have satisfied the Governor in Council that they have rehabilitated themselves and that at least five years have elapsed since the termination of the sentence imposed for the offence;

(d) persons who there are reasonable grounds to believe will

(i) commit one or more offences punishable by way of indictment under any Act of Parliament, or

(ii) engage in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence that may be punishable under any Act of Parliament by way of indictment;

(e) persons who have engaged in or who there are reasonable grounds to believe will engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, except persons who, having engaged in such acts, have satisfied the Minister that their admission would not be detrimental to the national interest;

(f) persons who there are reasonable grounds to believe will, while in Canada, engage in or instigate the subversion by force of any government;

(g) persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence;

s. 27(1)

(c) is engaged in or instigating subversion by force of any government,

(d) has been convicted of an offence under any Act of Parliament for which a term of imprisonment of

(i) more than six months has been imposed, or

(ii) five years or more may be imposed.

s. 27(2)

(c) is engaged in or instigating subversion by force of any government.

[58] *Ibid.*, s. 4(2)(b).

If the adjudicator determines that a refugee is subject to removal as a threat to national security or public order, an appeal may still be launched to the Immigration Appeal Board. In any case the refugee will be able to dispute the legality of the removal order, whatever the basis.[59] Furthermore, refugees in certain situations will have access to the Board's compassionate and humanitarian jurisdiction; however, if the removal order is based on paragraphs 19(1)(e), (f), or (g), the refugee's appeal is confined to legal and factual questions.[60] Certain classes of Convention refugees may therefore be removed from Canada solely on the basis of an adjudicator's determination with no access to the Immigration Appeal Board.[61] It is important to note that protection against *refoulement* can be denied any refugee who falls within the designated inadmissible classes.[62]

In addition, an individual outside Canada seeking refugee status may approach officials of the Foreign Branch of the Canada Employment and Immigration Commission and apply for an immigrant visa as a "Convention refugee seeking resettlement",[63] defined as "a Convention refugee who has not become permanently resettled and is unlikely to be voluntarily repatriated or locally resettled".[64] Such applications are given the highest priority in processing.[65] The visa officer is required to examine the facts of each case to determine if the requirements of the Act and Regulations have been fulfilled and to form an opinion of whether the applicant can become successfully established in Canada.[66] In order to do this, the visa officer must consider the same assessment criteria as those used to select independent applicants and, as well, the amount of

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[59] *Ibid.*, s. 72(2)(c).

[60] It is difficult to assume that s. 27(1)(c) or (2)(c) will ever constitute the basis of a removal order alone without being linked to s. 19(1)(e), (f), or (g).

[61] Since we are dealing with the refugee as a threat to national security, it is likely that a security certificate might be issued under s. 39 of the *Immigration Act, 1976*. Such a certificate could deny completely the refugee's ability to appeal on any basis.

[62] S.C. 1976-77, c. 52, s. 55. The Minister's consent is also required before return to a country posing a threat to the refugee's well-being can be effected.

[63] *Immigration Regulations, 1978*, SOR/78-172 (1978) 112 Canada Gazette Pt II 757, s. 7.

[64] *Ibid.*, s. 2(1).

[65] *Ibid.*, s. 3(a).

[66] *Ibid.*, s. 7(3).

settlement assistance available from government and private organizations in Canada.[67]

Finally, as significant numbers of individuals have been admitted to Canada under Special Refugee Relief Programs in situations where circumstances were beyond the reach of the Geneva Convention definition, the *Immigration Act, 1976* allows for admission of displaced and persecuted persons who technically would not be entitled to admission.[68] In addition, regulations may be made to facilitate the admission of members of a class of persons designated for special treatment. The power to relieve individuals in distress as a result of natural calamities, civil wars and other disasters has been granted to the federal Cabinet.

Generally, the new Act and its refugee provisions are a significant step forward in the history of Canadian immigration legislation. For the first time, refugees have been dealt with as a specific topic of concern. Applicable principles and standards have been set out in statutory form, rather than being left to the uncertainty of international political relationships. The Minister of Employment and Immigration, on the third reading of Bill C-24, stated in the House of Commons: "I am now more confident than ever that the refugee sections of the bill are among the most generous in the world. They far exceed our international obligations in terms of acceptance and protection of refugees".[69]

III. Canadian application of the international definition

As mentioned previously, Canadian immigration legislation has adopted the international definition of "refugee" as found in the Geneva Convention of 1951.[70] A number of judicial and administrative interpretations have been given to this definition in Canada. Thus, it is important to look at Canadian applications in order to determine whether the definition is adequate, or whether some modifications are necessary to adapt it to present international political reality. Although Canada's international obligations may not extend beyond adherence to treaty standards, an overly strict construction of the treaty and an inadequate definition could be subject to

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[67] *Ibid.*, s. 7(1). Under s. 7(2)(c), sponsoring groups are required to provide the Minister with a written undertaking that lodging, care, maintenance and settlement assistance will be provided for the Convention refugee and his family for a period of one year.

[68] S.C. 1976-77, c. 52, ss. 6(2) and 115 (1)(d).

[69] [1977] 8 H.C. Deb. 7979 (30th Parl., 2d Sess.).

[70] 189 U.N.T.S. 150, Art. 1A.

modification in order to reflect the truly humanitarian character of the refugee problem.

It is unfortunate that judicial tribunals above the level of the Immigration Appeal Board rarely have been given an opportunity to interpret the refugee definition. Decisions of the Refugee Status Advisory Committee are virtually non-reviewable. Although negative determinations can still be reheard by the Immigration Appeal Board, once the Board has ruled on the question, the matter must be returned to the adjudicator for final disposition. No right of appeal is provided for in the *Immigration Act, 1976* in cases of refugee redeterminations.[71] Thus the only possible way a superior court could construe the refugee definition would be through judicial review of the Board's redetermination findings under the *Federal Court Act*.[72] Due to the complex nature of the question to be decided, the heavy emphasis on factual matters, and the limitations of jurisdiction, it is highly unlikely that an application would even be launched, much less succeed. Similarly, under the old *Immigration Appeal Board Act*,[73] the issue of whether the claimant fell within the refugee definition was part of the Board's section 15 "equitable jurisdiction". It has been amply demonstrated that any appellate or reviewing court is loath to tamper with the Board's decision in this regard.[74] Thus, the decisions of the Immigration Appeal Board assume great importance.

The Geneva Convention definition was only incorporated into Canadian law in 1973.[75] Prior to that time the Immigration Appeal Board had jurisdiction to consider cases of unusual hardship under the discretionary power in section 15(1)(b)(i) of the *Immigration Appeal Board Act*. An individual ordered deported could apply to the Board to have that order quashed if he could show:

> the existence of reasonable grounds for believing that if execution of the deportation order is carried out ... [he] will be punished for activities of a political character or will suffer unusual hardship.

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[71] See S.C. 1976-77, c. 52, s. 84, and *Adamusik* v. *M.M.I.* [1976] 2 F.C. 63 (C.A.).

[72] *Quaere* whether this is possible.

[73] R.S.C. 1970, c. I-3 as am.

[74] See *Boulis* v. *M.M.I.* (1972) 26 D.L.R. (3d) 216, 223 (S.C.C.) *per* Laskin J. (as he then was): "[The Board's] reasons are not to be read microscopically; it is enough if they show a grasp of the issues that are raised... and of the evidence addressed to them, without detailed reference". This case involved an appellate situation. One can only suspect that judicial review would evoke an even stricter onus on the claimant where jurisdiction, rather than merit, is in issue.

[75] S.C. 1973, c. 27.

Similarly, under section 15(1)(b)(ii), a deportation order could be nullified by showing "the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief". The term "refugee" was not even mentioned in the Act. Persons claiming to be refugees had to fit themselves within one of the available categories without ever raising the legality of their refugee status directly.[76]

It is important to note the flexibility of the former discretionary powers. "Refugees" under the previous legislation could use the threat of punishment for political activity, claim unusual hardship, or invoke compassionate and humanitarian considerations in their efforts to avoid the execution of a deportation order. Even after the 1973 amendments and the adoption of the Convention definition, failure to bring himself squarely within the ambit of the definition did not preclude a refugee claimant from alleging unusual hardship or from pleading for compassion. Thus, many "near refugees" who, in the Board's interpretation, did not fit within the definition nevertheless were allowed to remain in Canada by proving the existence of other facts relevant to the unusual hardship or compassionate jurisdiction. Proof of facts to satisfy the definitional requirements was not essential as long as the person could at least achieve standing to appeal.[77] As stated earlier, the new Act does not allow the unsuccessful applicant this luxury.[78] Therefore, the definition of "refugee" adopted from the Geneva Convention has taken on extreme importance in immigration law. It is imperative that Parliament's belief that this definition provides an adequate standard not be found to have been misplaced. An unduly technical interpretation of its terms could cause much unnecessary hardship.

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[76] See Janzen & Hunter, *The Interpretation of Section 15 of the Immigration Appeal Board Act* (1973) 11 Alta L. Rev. 260.

[77] It should be noted that prior to 1973, standing to appeal to the Board was as of right. After that date severe restrictions were placed on the categories of eligible appellants. One eligible category, according to s. 11(3) of the *Immigration Appeal Board Act*, involved persons claiming to be "refugees protected by the Convention". After a preliminary hearing on that point, refugee claimants would normally succeed in establishing their cases during the actual appeal. As to the proper procedure, see *M.M.I.* v. *Diaz-Fuentes* [1974] 2 F.C. 331 (C.A.); *Lugano* v. *M.M.I.* [1976] 2 F.C. 438 (C.A.); *Maslej* v. *M.M.I.* [1977] 1 F.C. 194 (C.A.); and *Woldu* v. *M.M.I.* [1978] 2 F.C. 216 (C.A.).

[78] *Supra*, text accompanying note 55. Even individuals who have been determined to be refugees by the Advisory Committee or the Appeal Board can still be ordered deported by the adjudicator. With a right of appeal concerning questions of law, only a segment of those ordered deported have access to the compassionate and humanitarian jurisdiction of the Board.

A. *Well-founded fear*

The case of *Diaz-Fuentes* is perhaps one of the best illustrations of a Canadian interpretation of the Convention definition.[79] Since the definition alone has been incorporated into Canadian legislation, only its wording and its relationship to the statutory scheme may be considered judicially.[80] It is very clear that in cases of this nature the applicant will bear a heavy onus of proof.[81] The Board held that the key words in the definition were "owing to a well-founded fear of being persecuted", and that these words "are subject to an objective assessment ... based on proof the burden of which rests with the person who claims to be such a refugee; the definition is to be applied strictly. ... [O]nly persons who conform to this definition are to be declared refugees".[82]

In another case, the Board declared that

> fear, even well-founded or reasonable fear, is a subjective feeling within the person who experiences it. Its compelling and constraining power can vary in intensity from one person to another and should be evaluated in the light of the particular circumstances of each case. However, this evaluation must be made *objectively* by the court ... .[83]

The subjective fear of the applicant is to be assessed objectively: is it reasonable in the circumstances that the claimant feel a fear of being persecuted? Such a test, with the onus of proof on the applicant, indicates the importance of establishing facts through evidence. Counsel will frequently be involved with questions of immense international import. Expert witnesses must be used to testify

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[79] (1974) 9 I.A.C. 323.

[80] See *M.M.I.* v. *Diaz-Fuentes, supra,* note 73, 337 *per* Pratte J.: "The 'United Nations Convention Relating to the Status of Refugees' is only referred to once in the *Immigration Appeal Board Act.* ... Consequently [this] fact... does not have the effect of incorporating into Canadian domestic law the prohibition contained in that Convention against deporting refugees. Accordingly, a deportation order is not invalid merely by virtue of the fact that it was made against a refugee protected by the Convention". This decision had the effect of overruling the Board's practice as evidenced by cases such as *Cylien* (1973) 9 I.A.C. 72, *rev'd* [1973] F.C. 1166 (C.A.) and *Kovar* (1973) 8 I.A.C. 226. The same rule should apply to the *Immigration Act, 1976,* since the definition is the only Convention element specifically adopted; however, s. 55 does embody the prohibition against *refoulement* to some degree. The procedural aspects of *M.M.I.* v. *Fuentes* in the Federal Court of Appeal would appear to be still relevant: see ss. 70(2) and 71(1) of the *Immigration Act, 1976,* S.C. 1976-77, c. 52.

[81] See, *e.g., Phuoc* (1970) 8 I.A.C. 90 and *Hernandez* (1972) 5 I.A.C. 1.

[82] *Supra,* note 79, 329. See also *Mingot* (1975) 8 I.A.C. 351 and *Sévère* (1975) 9 I.A.C. 42.

[83] *Mingot, supra,* note 82, 356 *per* Houle, Vice-Chairman.

about the political structure of the applicant's former home country in order to support the allegations of persecution. Fundamental questions of democracy and legitimate governmental control are frequently raised. The humanitarian thrust of the refugee problem can be lost in a maze of political manoeuvres.

In the *Diaz-Fuentes* case,[84] the successful claimant was a Chilean national who had left the country shortly after the military overthrow of President Allende in September of 1973. His "well-founded" fear of persecution was established by the testimony of no less than seven witnesses. Some were able to relate stories of arrest, detention, torture, and death of relatives, inflicted on them by reason of their membership in a certain union and socialist political party (to which the claimant also belonged). Others, who had recently been in Chile or who had some expertise in the situation, were able to testify to the general state of affairs after the *coup*. The applicant was thus able to demonstrate that he would be persecuted for his political opinions if he returned to Chile. The fact of past persecution (which indicated a reasonable apprehension of further persecution if deported) and the fact that the applicant had worsened his position in the view of Chilean authorities allowed the Board to make an objective assessment that the applicant came within the strictures of the Convention definition. It is clear that landed immigrant status was granted on the basis of the strength and quality of the evidence presented.

B. *Ongoing flight*

While the claimant must prove his case by evidence on a balance of probabilities, and some cases indicate that the claimant should receive the benefit of the doubt,[85] the decisions of the Board have established further requirements. Although the idea of ongoing flight from persecution in the former country of residence to Canada has not been built into the definition the way it has in the United States,[86] other criteria suggested by the Board in relation to

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[84] *Supra*, note 79.

[85] *Mingot, supra*, note 83.

[86] *Immigration and Nationality Act of 1952*, 8 U.S.C. § 1153(a)(7)(A) (1970). See, *e.g.*, *Rosenberg* v. *Yee Chien Woo* 402 U.S. 49, 57 (1971) *per* Black J., quoting with approval the decision of the District Director of the Immigration and Naturalization Service. The U.S. Supreme Court held that "physical presence in the United States [must] be a consequence of an alien's flight in search of refuge" and that "the physical presence must be one which is reasonably proximate to the flight and not one following a flight remote in point of time or interrupted by intervening residence in a third country

the reasonableness issue seem to imply a necessity for a continuous unbroken flight from persecution. The Convention itself might be construed as requiring this element. Article 1(c)(3) states:

> This convention shall cease to apply to any person... if ...
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality ... .

Article 1(e) further provides:

> This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

These clauses were intended to be limitations on the scope of the refugee definition. Persons who had acquired a new nationality or a new residence which included rights similar to those of nationals were not to be given *carte blanche* to use their former refugee status as a method to subsequently gain entry to any country in the world. The refugee's assimilation and resettlement in another country where a claim to persecution could not be substantiated is treated as a solution to his problem. The question is clearly whether or not resettlement in another country, prior to the claim for refugee status in Canada, is fatal to the claim.

The Board assumed in three cases that a claim must be determined in relation to the claimant's country of residence and not in relation to the country which originally prompted the emigration.[87] All of the claimants had been granted a form of refugee status in other countries after their original flight from persecution. The Board was satisfied that each individual could legally return to the country of resettlement,[88] although in the face of some conflicting evidence, it was of the opinion that the refugee's fear must be established in relation to the country of resettlement rather than the original land. Thus the individuals concerned could only enter Canada through the normal process of immigration; their refugee claims were rejected. In none of the cases did the Board embark on an analysis of the quality of the refugees' status in their new

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reasonably constituting a termination of the original flight in search of refuge". The relationship of ongoing flight to credibility was touched on recently in *Villarroel* v. *M.M.I.*, F.C.A. Mar. 7, 1979, No. A-573-78 (unreported) *per* Pratte J.

[87] See *Harmaty* (1976) 11 I.A.C. 202 (Hungary to England); *Haidekker* (1977) 11 I.A.C. 442 (Hungary to Switzerland); and *Kovar, supra,* note 80 (Czechoslovakia to the U.S.).

[88] It should be noted that although there was no evidence that Harmaty could not return to England, it was not clear that he could return: *Harmaty, supra,* note 87.

countries as compared to that of nationals of those countries. This would seem to be the correct test, according to the Convention.[89]

In *Hurt* v. *M.M.I.*, the Federal Court of Appeal reviewed a judgment of the Board which refused to consider the claim of the applicant.[90] The applicant had claimed status as a refugee from Poland, although it seemed that he had lived for five years in West Germany on a temporary visa which was due to expire and would not be renewed. The applicant had Polish nationality and claimed to be a refugee *from Poland.* But the Board had stated that:

> the appellant is not a refugee from West Germany where he had spent a period of five years. ... Mr. Hurt did not suffer any persecution while he was in *Germany* ... .[91]

The Court was clearly of the opinion that the Board, in exercising the discretionary power given it by statute,[92] had asked itself the wrong question. The proper question was whether the claimant was a refugee from Poland, the country which had prompted his original flight and not whether he was a refugee from West Germany, his location of temporary resettlement. It was apparent that the Board had formulated an over-rigid policy in regard to the "resettlement elsewhere" issue. The quality of resettlement (in terms of whether the applicant has acquired rights and obligations equivalent to those of a national) should still be a relevant question. However, this is only one element of the claim. The country of origin must still be examined for evidence of persecution, although

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[89] 189 U.N.T.S. 150, Arts. 1(C)(3) and 1(E). Certainly, a distinction has always been made between the countries of first arrival and final resettlement. It is recognized that refugees will have to escape to the *nearest* country in cases of upheaval; yet this country should not have to bear the total responsibility for the refugee migration. If refugees become resettled in a manner similar to that of nationals, the problem has been resolved; however, mere residence alone should not deter a Canadian application from proceeding on an inquiry as to the *original* reasons for persecution. Canada is rarely the nearest or most convenient country of refuge. In many cases refugees are accepted in new countries, but the rights and obligations granted them clearly indicate that they must survive at the bottom of the legal, economic and social structure. For example, Austria frequently receives refugees from the Communist Bloc countries and Kenya grants entry to many African refugees. However, the status of these refugees is not one of equality with nationals. This type of discrimination may not be sufficient to constitute persecution under the Convention, but is an outgrowth of the refugee's original reason for migration. It is unfair to use such a distinction to negate the refugee's claim in Canada without a full and open inquiry into all the circumstances.

[90] [1978] 2 F.C. 340 (C.A.).

[91] *Ibid.*, 341 [emphasis added].

[92] R.S.C. 1970, c. I-3, s. 11(3) as am. by S.C. 1973, c. 27, s. 5.

this may become unnecessary where a *bona fide* resettlement has occurred elsewhere. However, the duty to decide is not abrogated by the fact of a resettlement; an evaluation of all the circumstances is required. The adoption of any other approach would allow the Board to value form over substance, and would permit Canada to reject refugees without an evaluation of the merit of their claims.[93]

There are a number of factors that should be considered in viewing the credibility or plausibility of the claim. Firm resettlement elsewhere may be a factor negating a "well-founded fear". Similarly, the timeliness of the application is important. Applicants living in Canada as visitors or with employment visas prior to their applications should be viewed with some skepticism. Their delay in seeking refugee status could very well negate the reality of their fear of persecution. In addition, individuals who provide false information on their applications for admission, or who only raise refugee claims when faced with the possibility of deportation, may severely damage their credibility, as such a manoeuvre indicates an attempt to avoid the normal immigration process and a frivolous claim. Nevertheless, these factual circumstances must only be viewed as *indicia* of the claim as a whole. The humanitarian basis of the refugee admission should remain the central focus. It may be unfair to require strict criteria such as ongoing flight, continual fear, or lack of delay when dealing with such problems. True refugees are quite likely to be fearful and suspicious of governmental authority. None of these factors should be considered sufficient reason to reject a claim. At best they only contribute to the value of the evidence presented. They cannot be substituted for an evaluation on the merits.

C. *Persecution*

The major difficulty with the definition involves the legitimate criteria for "persecution". Not every form of persecution validates

[93] A similar problem is the question of statelessness. See Convention on the Reduction of Statelessness, U.N. Doc. A/CONF. 9/15 (1961), acceded to and ratified by Canada. Although statelessness alone should not be sufficient to satisfy an individual claim to refugee status, the Board should have a strict duty to examine all the circumstances surrounding the failure to acquire a nationality. In *Chiu* (1975) 10 I.A.C. 249, a Chinese citizen found refuge in India after the Indo-Chinese War of 1963. His attempts to gain Indian citizenship were rejected as not in compliance with Indian law. Evidence showed that he was singled out because of his race and consequently suffered restricted freedom of movement and economic hardship. Yet the Board disposed of his case by showing that he could return to *India*, without dealing with the issue of whether he was a refugee from *China*.

a claim to protection as a refugee, but only persecution by reason of "race, religion, nationality, membership of a particular social group or political opinion".[94] Cases in Canada, for the most part, have concerned themselves with the meaning of "political opinion" and "social group".

1. Political opinion

Prior to the adoption of the Convention definition, the Board was able to prevent deportation of an individual who could show that "he [would] be punished for activities of a political character".[95] Cases interpreting this phrase took a rather restrictive approach. In the words of two authors:

> Punishment is defined as punishment by the state and according to law. An activity takes on a political character only when it challenges governmental authority in a public way.[96]

Thus, under the former section, if there were no punishment by law within the home country or if an act were not a public challenge to the authority of the state, no "political" activity within the meaning of the Act had occurred.[97] It is important to determine whether the Board has widened its approach to "political opinion" or whether its past restrictive approach to matters of this type has continued.[98]

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[94] 189 U.N.T.S. 150, Art. 1A.

[95] *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, s. 15(1)(b)(i).

[96] Janzen & Hunter, *supra*, note 76, 275. See also the *Phuoc* and *Hernandez* cases, *supra*, note 81; *Bourret* (1969) 6 I.A.C. 414; *Petersen* (1968) 7 I.A.C. 222; *Daniolos* (1971) 2 I.A.C. 434; and *Zisimopoulos* (1972) 3 I.A.C. 343.

[97] Janzen & Hunter take issue with this restrictive approach; see *ibid.*, 276: "But is it not true that in the police state realities of the twentieth century, many 'punishments' take place with the authorisation of government but without regard to law, and do not some of these 'atrocities' occur respectably cloaked in the mantle of kafkaesque [*sic*] trials and sham legality? ... We would submit that some private challenges are activities of a political character as well. For example, to desert the military or to refuse to serve in it could be 'political' ... if it were motivated by a fundamental disagreement regarding the political objective for which the military forces were being used...".

[98] A useful comparison can be made with the field of extradition where it has long been held that international fugitives from justice should not be returned where the offence is "of a political character". See La Forest, *Extradition To and From Canada* 2d ed. (1977), 61-82, and Castel & Edwardh, *Political Offences: Extradition and Deportation — Recent Canadian Developments* (1975) 13 Osgoode Hall L.J. 89. It appears that Canadian courts have denied any jurisdiction to qualify and define the phrase "offence of a political character" for fear of usurping the executive prerogative to cri-

A straightforward illustration of the problem is shown in the *Bilic* case.[99] A Yugoslavian national, of Croatian ethnicity, was a member of the Hrvatska Matica organization (an anti-Communist, pro-Croatian cultural and political group). Although this group had been banned by the Yugoslavian government, it continued to operate in a clandestine fashion. Membership alone would constitute sufficient ground for arrest and imprisonment "by law". In addition, the claimant stated that, as a result of his presence at official Communist Party meetings in his hotel, he had gained access to secret Communist government information and he had illegally supplied this information to the Matica organization. On learning that he was to be arrested, he fled to Austria and eventually came to Canada as a visitor. The Board granted him landed immigrant status on the basis of a successful refugee claim. The applicant obviously had a well-founded fear of being persecuted for reasons of his political opinions and his membership in a particular social group. Even though the applicant's evidence was not substantial and there had been a delay in bringing the claim, his case was not thereby prejudiced. The Board appears to be sympathetic toward Eastern European anti-communists, perhaps because these claimants have accepted Western ideology, perhaps because of the Board's understanding of the conditions of life in these countries.[100]

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ticize foreign governments. See *Re State of Wisconsin & Armstrong* (1973) 10 C.C.C. (2d) 271 (F.C.A.) and *Re Peltier* [1977] 1 F.C. 118 (T.D.). Compare the more liberal English approach on this question in *Schtraks* v. *Government of Israel* [1964] A.C. 556 (H.L.).

[99] (1974) 10 I.A.C. 413.

[100] U.S. immigration laws show a blatant preference for certain ideological views held by eligible refugees. Only aliens who have fled from Communist or Communist-dominated countries, or from the general area of the Middle East, are eligible to apply for immigration from outside the U.S. by conditional entry and adjustment of status under s. 203(a)(7) of the *Immigration and Nationality Act of 1952*, 8 U.S.C. § 1153(a)(7) (1970). See Kap, *Refugees Under United States Immigration Law* (1975-76) 24 Clev. St. L. Rev. 528, 530. There are other methods of entry, however, without these necessary qualifications. See Gross, *Refugee-Parolee: The Dilemma of the Indochina Refugee* (1975) 13 San Diego L. Rev. 175. The general English experience can be gleaned from Evans, *Immigration Law* (1976). An interesting analysis of the English immigration process is to be found in Moore & Wallace, *Slamming the Door, The Administration of Immigration Control* (1975). Recently in *Orellana* v. *M.E.I.*, F.C.A., July 25, 1979 (unreported), *rev'g* on other grounds the decision of the I.A.B. rendered Dec. 19, 1978, Kelly D.J. alluded to the proper test to be used in examining the claimant's political activities. He stated that "the crucial test in this regard should not be whether the Board considers that the Applicant engaged in political activi-

2. Social group

In cases involving a less distinct ideological separation, the Board has assumed the task of confining the "social group" and "political opinion" terminology of the definition. A stricter test was suggested in a series of cases dealing with Haitian nationals who attempted to enter Canada as refugees to escape the reactionary Duvalier regime.[101] The successful claim in *Diaz-Fuentes*[102] is not typical of the Board's approach to refugees from the Western Hemisphere. Countries with anti-Communist leanings and major participants in the multi-national capitalist economic systems seem incapable of producing refugees under the present Canadian interpretation of the Convention definition. The principle of the international comity of nations would seem to play an important role in cases of this type.

The *Sévère* decision involved a Haitian citizen who entered Canada as a visitor (with a return airline ticket) and was ordered deported upon his arrival. He launched an appeal to the Board claiming protection as a Convention refugee. The Board responded:

> International doctrine and jurisprudence hold that this definition must be strictly applied [and] ... mere apprehension about possible future hardships and maltreatment is not sufficient.[103]
>
> In all cases, it is the responsibility of the person claiming the status of refugee protected by the Convention to establish the *credibility* and *plausibility* of the fear which he feels or by which he is possessed, and to answer all questions *frankly*. For its part, the court in authority should see to it that the Convention is not used as a means of evading the laws and regulations governing immigration into the host country, and which would otherwise apply.[104]

In one of the clearest statements of the nature of "persecution" required under the definition, the Board said that "this concept is always associated with the idea of constant infliction of some mental or physical cruelty".[105] Certain things were excluded from the definition:

> [F]ear of being legally prosecuted before regular courts, of being punished for refusing to do military service or deserting, difficult economic

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ties, but whether the ruling government of the country from which he claims to be a refugee considers his conduct to have been styled as political activity" (Reasons for Judgment, 5-6). It would seem that this statement constitutes the proper standard.

[101] See *Mingot* and *Sévère, supra*, note 82, and *Belfond* (1975) 10 I.A.C. 208.

[102] *Supra*, note 79. This case was overruled on other grounds: *supra*, note 77.

[103] *Supra*, note 82, 46-47.

[104] *Ibid.*, 47 [emphasis in original].

[105] *Ibid.*

> conditions [or] political dissent — even when open — ... [cannot] ... constitute a fear of persecution as defined in the Convention.[106]

These statements constitute the strictest application of the definition to date.

The Board seemed to prefer form to substance in attempting to rank the honesty and openness of the applicant as the primary consideration. The applicant had lied on arrival and had only formulated his intent to apply for refugee status when deportation became inevitable; this was fatal to his claim. It is important that some compassion exist in cases of this nature. The desire not to return to a place where his life may be in danger is frequently the refugee's prime motivation. With little knowledge of the Canadian immigration process, the individual may not even know of the existence of the privilege to claim protection as a refugee under the Act. The timeliness of the application does not make an individual any more or less of a refugee until all the facts are examined. That the applicant will demonstrate fear is expected; is it not logical that this fear will carry over into dealings with governmental authorities generally?[107]

Sévère was a member of a cultural group with socialist tendencies, called the *Coumbite*, that engaged in theatrical productions which were highly critical of governmental policies in Haiti. Its leaders were consequently harassed and arrested by the police and the Tonton Macoute Militiamen. The applicant testified that he narrowly escaped arrest many times, remained in hiding for four years, and then escaped to the Bahamas. Five witnesses testified as to the social and political circumstances in Haiti, but none was able to testify specifically to the occurrence of events involving the claimant. Despite the fact that an applicant will rarely be able to find a personal acquaintance in Canada able to corroborate his story, the Board rejected the evidence of the witnesses as unreliable because it was hearsay.[108] Although the Board's decision must be

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[106] *Ibid.*

[107] Counsel for Sévère had provided an explanation of his client's behaviour. "I shall ask the Court to take into consideration my client's psychological condition on his arrival at Dorval. Here was a person who lived in hiding for four years in Haiti and for several more months in the Bahamas": [reporter's translation] *ibid.*, 49. The applicant also said: "I did not know how things were done here; I had no idea at the airport and I did not wish to present the claim there because I knew that such status could not possibly be granted before I passed through the airport": [reporter's translation] *ibid.*, 50.

[108] The Board, however, operates under less rigid rules of evidence and procedure than do courts of law: *Immigration Act, 1976*, S.C. 1976-77, c. 52, s. 65(2)(c).

based on the application of the Convention definition to the evidence adduced, humanitarian considerations should surely give to the applicant the benefit of the doubt, especially where corroborative testimony as to specific facts may be difficult, if not impossible, to achieve.

The Board finally classified the *Coumbite* as akin to a "literary circle".[109] But is this not at least a "social group"? Since the definition does distinguish between membership in a "social group" and "political opinion", is it necessary that a "social group" be defined as one which has "political opinions"? Even if the *Coumbite* were only a cultural or social group, were not its members persecuted? Would they not be persecuted if returned to Haiti? The Board seems to have acknowledged this fact:

> It is conceivable [that the applicant was sought by the police for arrest] because under a dictatorial regime and in a police state, oppressive and arbitrary treatment are the rule and any activity — even of a cultural nature — may be suspect. However, Sévère was not a leader; he merely took part in demonstrations. ... Under the Convention, dissent — even open dissent — does not suffice for a person to be declared a "refugee".[110]

In the end the Board held that the claim was a "futile and frivolous" attempt to evade the normal process of law: a "flagrant abuse of the Convention".[111] This astounding conclusion could only be reached by equating "social group" with "political opinion" under the definition, and by unduly limiting the definition through strict requirements of proof.

The Haitian national in the *Mingot* case[112] met with a similar rejection. Again the Board criticized the applicant for seeking to come to Canada as a visitor and considered his return airline ticket as undermining his credibility. The claimant was a salesman in a clothing store which supplied the Tonton Macoutes (military police) and was constantly harassed and mistreated by them. Evidence indicated that another salesman had been killed by the Macoutes for a trivial matter.[113] The Board concluded that the claim-

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[109] *Supra,* note 82, 55.

[110] *Ibid.*

[111] *Ibid.*, 56.

[112] *Supra,* note 82.

[113] The Board considered that this incident could not be attributed to governmental action; the murder could not be considered to be *legally* authorized by the government through its agents, the Tonton Macoutes. It seems rather naive to suggest that "persecution" must emanate directly from the government in order to qualify under the definition. It cannot be assumed that all legal systems operate under the theory of the rule of law.

ant showed only an apprehension of maltreatment and not "persecution" as defined in the Convention.[114]

To be sure, the claimant had not publicly alleged his violent disapproval of the governmental system. He feared for his life because of his social and economic position as a shopkeeper. He wished to leave because existence was intolerable in a police state. Yet this very fact was fatal to his claim: refugees are not accepted because they seek a "healthier social atmosphere".[115]

> The apprehension or calculation of the hardships which may be the lot of an entire group of people; and the reasonable desire to improve one's condition in life, either psychologically, socially or morally, are not sufficient justification for the Court to exercise its discretionary powers.[116]

The Board appears to be effectively acquiescing in the political structures which exist in many unfortunate countries. Refugees undoubtedly have a desire to improve their living conditions; however, under the prevailing interpretation, mere mention of this fact can destroy the basis of the claim. Certainly the integrity of the immigration structure must be protected; one wonders, though, if it is necessary to stipulate such formal standards of proof. Not every claimant is attempting to avoid the rigours of the immigration system; most are attempting to save their lives.

In the *Belfond* case[117] the same reasoning was applied to another Haitian refugee claimant. Here the applicant had spent two years in Canada and was afraid to return to Haiti because he feared that the Haitian government considered Haitians in Canada as anti-Duvalier and subversive and would subject them to persecution on their return. He was a member of the *Bureau de la Communauté chrétienne des Haitiens de Montréal,* and the Minister of Information in Haiti had stated publicly that these individuals were to be regarded as subversives if deported to Haiti. The Board seemed concerned to avoid the practical implications of granting refugee status in this case; however, the Board is surely empowered to deal with cases on an *individual* basis. The fact that a decision might allow others in similar circumstances to gain access to refugee protection should not negate the case of the claimant before the Board. It certainly cannot mean that the individual claimant

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[114] *Supra,* note 82, 356.

[115] *Ibid.,* 354 [reporter's translation].

[116] *Ibid.,* 367.

[117] *Supra,* note 101.

is not a refugee because of the practical limitations of dealing with a large number of people in a similar situation.[118]

The applicant, however, did not present testimony relevant to his particular circumstances, and did seem to be presenting a case for the *Bureau*. The Board limited the term "social group" very specifically:

> Either the group must be political and proclaim and exhibit dissidence with the regime or be a religious sect which has been persecuted by the civil authorities because of its religious beliefs. In a multinational state, a racial minority might constitute such a group.[119]

Under this analysis, nothing is gained by the insertion of a "social group" in the definition, as political opinions, religion and race are all specifically mentioned. "Social group" must have a further significance.[120]

The definition of "social group" was further narrowed in the case of *Thomas* in which an escapee from the Kentucky State Reformatory claimed protection as a refugee.[121] The claimant had been sentenced to ten years' imprisonment for robbing a gas station of forty dollars. While in prison, he was physically abused, raped, beaten and threatened with death by fellow inmates. His claim stated that he had a "well-founded fear" of being persecuted as a result of membership in a particular social group, namely incarcerated persons in the United States of America. The Board properly refused the claim. Its comments on the expression "particular social group", however, are illuminating:

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[118] *Ibid.*, 225: "The Immigration Appeal Board is not a United Nations Commission, responsible for investigating the political regimes of various countries". On the contrary, how can the Board evade this responsibility? Some input concerning various political regimes must occur in order to fully appreciate the nature of the refugee's claim. Justice cannot be done unless the claim is evaluated in light of all the surrounding circumstances; what may be a perfectly tolerable political stance in Canada may be the subject of persecution in a military dictatorship. But this cannot be determined without *some* evaluation of another country's political structure.

[119] *Ibid.*, 222.

[120] Haitian nationals have caused extreme difficulty in the interpretation of the Convention definition in both the U.S. and Canada. It has frequently been argued that persons who might leave for economic reasons will nevertheless be politically persecuted if returned home for having *claimed* protection in another state: see Dernis, *Haitian Immigrants: Political Refugees or Economic Escapees?* (1976) 31 U. Miami L. Rev. 27, and Lieberman & Krinsky, *Political Asylum and Due Process of Law: The Case of the Haitian Refugees* (1976) 33 Guild Practitioner 102.

[121] (1974) 10 I.A.C. 44.

> [T]he expression "particular social group", as used in the definition, is intended to denote a group that would suffer because its loyalty to the government is distrusted or because the political outlook of its members is held to be an obstruction to the government's reforms. ... The Geneva Convention was not created to protect foreigners who are fugitives from justice and neither can the criminal sentence which the claimant received be considered as a measure of persecution in the sense of the Geneva Convention since this sentence was of a non-political character. The Geneva Convention allows no reason for justifying refugee status on the basis of the offensive actions of private persons. Persecution must always stem from those in power or must be condoned by those in power. There is no evidence before the Board that the state government has condoned this behaviour on the part of his fellow-inmates and therefore the claimant does not appear to fall within this category.[122]

The only relevant social group under the Canadian interpretation of the definition is thus one that both expresses political opinions and is persecuted directly by government institutions.[123]

IV. Appraisal of refugee procedure

While the overall treatment of refugees under the *Immigration Act, 1976* must be viewed as an improvement over former procedures, some confusion remains. There is no systematic or logical progression in the procedures for determining refugee status. Pro-

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[122] *Ibid.*, 47.

[123] It is interesting that the Board suggested that protection might be granted if the appellant could show he was convicted of a political offence. In *Mingot, supra,* note 82, 357, the Board said "that the Convention refers to political opinion, not political acts". If the Board in *Mingot* was suggesting that no protection would be granted to refugees who had carried their political opinions into action through deliberate violations of criminal law, it would be interpreting the definition so as to render it meaningless. As stated by Plender, *supra,* note 27, 56: "It is seldom the mere possession of an opinion that attracts persecution; rather it is its expression". See also *Fogel* (1974) 8 I.A.C. 315, where a black woman from the U.S. who had denounced her citizenship and claimed persecution by the FBI was denied refugee status. It is highly unlikely that anyone from the U.S. will ever be able to successfully claim refugee status on any grounds. Note that the Board also stated that the Geneva Convention was not created to protect foreigners who are fugitives from justice. One might ask a similar question about the *Immigration Act, 1976.* Was it created for the purpose of returning foreigners who are fugitives from justice? Extradition is imbued with the venerable protections for the accused available in the criminal process. Deportation is a civil proceeding. The cases of *Hernandez, supra,* note 81 and *Hogan* (1972) 5 I.A.C. 360 are really extradition cases disguised as deportations. As to U.S. practice in this regard, see Abramovsky & Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction or Irregular Rendition?* (1977) 57 Oregon L. Rev. 51.

visions concerning refugees are scattered throughout the statute and the procedure remains highly complex and unnecessarily lengthy. Too many hearings must be held and too many officials must participate in the process before any case can be concluded. An immigration officer, a senior immigration officer, the Refugee Status Advisory Committee, the Minister, the Immigration Appeal Board, and the Federal Court may all be involved in hearings before a potential refugee will have a definitive answer to his claim. No one decision maker has authority to deal with a claim in a simple fashion before the parties. As a result, a uniform and coherent jurisprudence is unlikely to develop.

A refugee applicant does not receive full procedural protection in the early stages of his claim. Despite the improvements over the former system,[124] the separation of the fact-finding mechanism from the actual decision maker is bound to create some injustice. Untrained immigration officers and claimants unaware of all the legal details may omit essential elements of the claim. Language barriers may further complicate the process, although departmental interpreters are provided and the right to counsel has been stipulated in the statute.[125] Most important, the credibility of the applicant is assessed by the Committee only on the basis of the transcript of the applicant's examination under oath.[126]

Under the former legislation, courts required strict observance of the refugee procedure and the immigration officer was often insulated from judicial review. In *Re Sparrow & M.M.I.*,[127] the Trial Division of the Federal Court denied that an American Army deserter had the right to require a re-opening of his deportation hearing in order to admit evidence of his refugee claim, even though he had not been aware, during the course of his hearing, that such a procedure was available to him. The result of this decision may hinge on the peculiarities of the old legislation and the lack of a visible remedy. Re-opening was discretionary[128] and therefore not a proper subject for *mandamus*. The Special Inquiry Officer had no jurisdiction to consider a refugee claim, and technically such evidence would not be relevant to his decision in

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[124] These include the removal of the prerequisite of a deportation order in applying for refugee status and the obligation to supply the claimant with a copy of the transcript.

[125] *Immigration Act, 1976*, S.C. 1976-77, c. 52, s. 45(6).

[126] *Ibid.*, s. 45(1)-(4).

[127] (1977) 75 D.L.R. (3d) 158 (F.C.T.D.).

[128] *Immigration Act*, R.S.C. 1970, c. I-2, s. 28.

relation to deportation. However the applicant might have sought leave to appeal to the Immigration Appeal Board instead.

The difficulty of judicially reviewing the officer who records the transcript was demonstrated in the case of *Ut Nan Lam* v. *M.M.I.*[129] The Vietnamese applicant had lost his former citizenship following the fall of South Viet-Nam in 1975. The immigration officer who transcribed the sworn declaration sought to control the process of compilation by refusing to permit the applicant's counsel to ask further questions which he termed repetitious. The applicant claimed a denial of the principles of natural justice. The Court refused the application for a writ of *mandamus* to compel the allowance of further evidence and treated the immigration officer's function as completely investigatory and not an integral part of the decision making process for refugee claimants. Thus the basic procedural protections of natural justice would not be available. Walsh J. did elaborate to some extent:

> It is evident that the immigration officer merely presides over the inquiry, asking the necessary questions (although this does not prevent petitioner from being represented by counsel who may also ask questions and presumably call witnesses) and then transmits the transcript to the Committee who makes the decision. He himself makes no recommendation.[130]

Since the function of the officer charged with compiling the transcript is not of a quasi-judicial nature, there is no guarantee of a full and fair hearing beyond the right to counsel.[131] The Committee and the Appeal Board may be provided with inadequate material on which to rule. The Act or Regulations should have clarified this in order to prevent potential abuse.

Although the new legislation has ameliorated the past hardship caused by requiring refugee claims to be processed under the umbrella of an unexecuted deportation order, the question has

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[129] [1978] 2 F.C. 3 (T.D.).

[130] *Ibid.*, 6. It appears once again that counsel may have sought the wrong remedy. A declaration or injunction may have been more appropriate. In addition, the possibility of a future appeal to the Immigration Appeal Board offered further protection. Yet the nature of the declaration before both the Committee and the Board is of immense significance to the potential success of the claim.

[131] *Quaere* whether the doctrine of fairness as recently developed in the case of *Re Nicholson & Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311 might have some application in these circumstances. See also Mullan, *Fairness: The New Natural Justice?* (1975) 25 U.T.L.J. 281 and Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law Theory* (1978) 28 U.T.L.J. 215.

arisen as to whether an individual can apply directly for status as a refugee claimant. Section 45(1) states that refugee claims may be made "during an inquiry", seemingly requiring the invocation of the removal process before a claim can be invoked. Thus unsuccessful claimants would be assured of removal from Canada regardless of how their claim originally arose. In the recently decided case of *Re Hudnik*,[132] the Federal Court of Appeal adopted this interpretation of section 45(1).

The facts are relatively straightforward and indicative of the kind of problem frequently encountered in this area. Mr Hudnik, a Yugoslavian national and crew member of a merchant vessel, jumped ship in Vancouver and immediately reported to immigration authorities who commenced removal proceedings against him. Unrepresented by counsel and unapprised of his right to claim refugee status, he was ordered deported. He subsequently obtained advice and sought to claim refugee status, but was informed that he had lost his opportunity to do so since such a claim must be made "during an inquiry". An application for *mandamus* to compel the processing of his claim was successful at first instance. Using the *non obstante* provision of section 6(2), the policies of section 3, and the United Nations Convention on Refugee Status, Walsh J. of the Trial Division concluded:

> [T]here should be some procedure whereby an Applicant for refugee status can make such an application and cause an inquiry to be instituted, rather than being forced to await the commencement of an inquiry based on a report seeking his deportation and then making his claim for refugee status as an incident in the course of this inquiry.[133]

However, on appeal this interpretation was nullified by Mr Justice Pratte. After stating that the United Nations Convention was not part of the law of Canada, he held that the *Immigration Act, 1976* did not contain any provision which imposed on the Minister the duty to consider a claim to refugee status made outside an inquiry. The existence of an unexecuted deportation order thus prohibits the claimant from having the application considered.

The form of the Refugee Status Advisory Committee and the procedures surrounding its operation are somewhat redundant. It may be supposed that one of the reasons for establishing such a cumbersome system of processing was to give the government an opportunity to review sensitive cases. The international complexi-

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[132] F.C.T.D., Jan. 26, 1979, No. T-233-79 (unreported), *rev'd* (*sub nom. M.E.I.* v. *Hudnik*) F.C.A., Aug. 9, 1979 (unreported).

[133] *Ibid.*, 6. As to the transitional implementation of the new Act and refugee status, see *Riveros-Melo* v. *M.M.I.* [1979] 1 F.C. 344 (C.A.).

ties of refugee admission may require this additional step; however, if it is to be included, it should not serve as an excuse for failures to provide adequate procedural protection to the claimant.

One difficulty is that the Committee is advisory only; the Minister is vested with the discretion to make the final decision.[134] The extensive use of ministerial discretion in immigration affairs has had a long history and the present Act is faithful to the tradition. However, it is likely that the Minister will follow the Committee's recommendation.

The Committee does not hold an adjudicative hearing in the presence of the applicant. In fact, present operational guidelines specifically exclude the public, refugee claimants, or counsel from attending or participating in Committee deliberations.[135] However, the Committee *sui motu* has the power to call expert witnesses, request advice and information concerning the circumstances existing in the country from which the claimant fled, and require a new or further interview of the claimant.[136]

A major concern of the Committee is to guard the integrity of the procedure against frivolous or non-genuine claims; however, the claimant is apparently to be given the benefit of the doubt in the absence of conclusive contrary evidence. Nevertheless, *in camera* proceedings from which the claimant is excluded cannot lend themselves to any full treatment or analysis, although there is no indication that the rate of rejection has been scandalous. The Committee was not established primarily for the benefit of claimants; no serious effort has been made to afford them a complete, impartial, alternative admission procedure. Government priorities are the real beneficiaries. Successful claimants cannot be given a final determination of their status since further processing is still required. In this additional step, the claimant is only successful by default.[137]

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[134] S.C. 1976-77, c. 52, s. 45(4).

[135] Employment and Immigration Commission, *Guidelines for the Refugee Status Advisory Committee* (unpublished instructions obtained from the Ministry), s. III(b) (vii).

[136] *Ibid.*, ss. III(b)(viii) and IV(k).

[137] Apparently, the Minister has also established a Special Review Committee which re-examines any negative decisions on status by the Advisory Committee. This extra committee, composed of public servants alone, can authorize special action in situations not covered by the present definition. This committee could be an effective administrative tool if used in a humanitarian manner. Statistics provided by the Ministry indicate that the success rate of refugee claims handled by the Advisory Committee has been 36.8%. Hon. Bud Cullen, *Re: The Case of Ignacio Munoz*, Feb. 19, 1979.

Refugee redetermination hearings before the Immigration Appeal Board[138] may appear to be an added safeguard, but the difficulty inherent in successfully gaining the right to an oral hearing makes the procedure inadequate. The Board must first decide on the basis of written material whether on the balance of probabilities there are reasonable grounds to believe the claim can succeed.[139] The claimant is not limited to the establishment of a *prima facie* case, or to the demonstration of the genuine nature of his deposition, but effectively has to prove his case without the benefit of an oral hearing.

This cumbersome two stage procedure seems unduly onerous. When combined with the elimination of the unsuccessful refugee claimant's right to raise humanitarian and compassionate grounds on appeal in lieu of his refugee claim, it can only be concluded that the appeal provisions have placed the individual in a less desirable position vis-à-vis his standing under the former legislation.

Recently, in the case of *Villarroel* v. *M.E.I.*,[149] a further gloss was placed on the test to be used by the Board in the screening of applications for the full hearing. Mr Justice Pratte stated:

> In my view, section 71(1) requires the Board to refuse to allow the application to proceed not only when the Board is of opinion that there are no reasonable grounds to believe that the claim could be established but, also, when things are so evenly balanced that the Board cannot form an opinion on that point. In other words, under section 71(1), as I read it, the applicant does not have the benefit of the doubt; on the contrary, the doubt must be resolved against him.[141]

To add this further hurdle to the refugee claimant's application is unwarranted.

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[138] S.C. 1976-77, c. 52, s. 59(1).

[139] *Ibid.*, ss. 70(1) and (2) and 71(1). As to the danger inherent in this approach under the former legislation, see the Appeal Board's judgment in *Cylien, supra,* note 80, 80: "[I]t would be monstrous to conclude from the wording of s. 11(3) [of the *Immigration Appeal Board Act*] that a democratically elected Parliament in a country under the rule of law intended a judicial tribunal ... in the case of persons claiming to be refugees, to determine the future fate, or even the life of a man, *without a properly constituted hearing* on this point. It is no answer to say that a claimant has a full opportunity to make his claim, in writing. His declaration of claim is only part of the evidence; he must have every opportunity to establish, as the respondent must have every opportunity to contest, his claim to refugee status within the meaning of the Convention". This strict procedural requirement has been continued under the present legislation: see *Tapia* v. *M.M.I., supra,* note 47.

[140] *Supra,* note 86.

[141] *Ibid.*, 4, n. 3.

The final screening process imposed by section 4(2) of the Act only adds further confusion to the refugee admissions process. A positive determination on refugee status by the Refugee Status Advisory Committee, the Minister, or the Immigration Appeal Board must be followed by a further hearing before the adjudicator to decide whether the refugee shall be removed from Canada as a security risk. No general determination of refugee status is made through the various stages of the process. It would seem that a system of classification ought to have been established to evaluate all evidence, including security considerations, which relates to refugee status as a whole.

Criteria applicable to Convention refugees have been drafted in a very vague and general fashion and pose the threat of removal based on political grounds.[142] The adjudicator must in many cases predict the future pattern of behaviour of the refugee as well as examine his past record of criminal or *quasi*-criminal activity. The exclusions are ambiguously phrased and no allowance is made for "political crimes", even though it would be quite reasonable to assume that refugees may have committed political acts in their former countries which would be considered offences under Canadian law.[143] Section 19(1)(f) would expel persons likely to engage in or instigate the subversion by force of *any* government. Many *bona fide* refugees would continue to work legally within Canada for the overthrow of oppressive regimes in their former countries. The resumption of the adjudication is intended to eliminate serious threats to the security and public order of Canada; yet these sections do not reflect the special nature of the refugee dilemma nor do they ensure that a wholly objective approach will be taken to protect Canada from serious disruptive violence.

Convention refugees who are outside their former countries and also outside Canada may make an application to an external visa officer of the Foreign Branch of the Canada Emplоyment and Immigration Commission at one of the more than sixty offices abroad.[144] It is the visa officer's duty to determine if the applicant is a Convention refugee[145] — a rather complex legal matter for an

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[142] Of course, an appeal of a decision against a claimant may be available by virtue of s. 72 of the *Immigration Act, 1976*, S.C. 1976-77, c. 52.

[143] See generally Wortley, *Political Crime in English Law and in International Law* (1971) 45 Brit. Y.B. Int'l L. 219, 226-28.

[144] S.C. 1976-77, c. 52, s. 9(1).

[145] SOR/78-172 (1978) 112 Canada Gazette Pt II 757, s. 7(1).

individual who is not necessarily well-versed in all of the intricacies of such a classification. Granting this essentially uncontrolled power to an administrative official may lead to potential abuse; however, this has been a typical feature of Canadian immigration procedure since the turn of the century. Furthermore, Convention refugees are not admissible to Canada unless they show that they can become "successfully established" in Canada.[146] These regulations clearly demonstrate the selective as opposed to the humanitarian nature of the policy.

All of the factors which are normally used to determine the suitability of ordinary immigrants are also applied to refugees. The labour-oriented criteria of the Units of Assessment[147] are used to determine if the refugee meets Canada's employment or investment needs. Admission may be facilitated by sponsoring groups in Canada and any other available financial assistance,[148] although it would seem repugnant to the humanitarian philosophy of refugee treatment to require standards of "suitability" similar to those applied to ordinary immigrants. While the extensive sponsorship possibilities should be praised, the essentially self-serving process of evaluation should be recognized as contrary to the real purpose of the international conventions.

Although the regulatory provisions outlined in section 6(2) of the Act could relieve the difficulties faced by refugees falling outside the Convention definition, those regulations which have been enacted thereunder have made little practical difference, as they have in effect substituted conditions only slightly less onerous than those contained in the general regulations.[149] However, the very inclusion of such a provision as section 6(2) indicates that Parliament may have understood the deficiencies in the current definition. Its wide scope (evidenced by the *non obstante* provision) opens up a reservoir of positive potential which may be tapped by a future administration.

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[146] *Ibid.*, s. 7(3)(b).

[147] *Ibid.*, Schedule 1.

[148] *Ibid.*, s. 7(2).

[149] See *Indochinese Designated Class Regulations*, SOR/78-931 (1978) 112 Canada Gazette Pt II 4464; *Latin American Designated Class Regulations*, SOR/78-932 (1978) 112 Canada Gazette Pt II 4467; *Self-Exiled Persons Class Regulations*, SOR/78-933 (1978) 112 Canada Gazette Pt II 4470.

Conclusion

The continuing plight of the Vietnamese "boat people" has once again brought the issue of refugee resettlement to the attention of Canada and the world. The most obvious permanent solution to the refugee problem is voluntary repatriation to the country of origin. However, this desirable solution is only possible when circumstances so permit; assimilation of the refugee into a new national community is often the only real humanitarian alternative. It is therefore important that Canada facilitate methods and procedures that make this alternative a practical reality. As a member of the international community, and as a signatory to the international conventions, Canada has a legal as well as a moral duty to become part of the solution.

Canada's policies must be described as admirable when compared to those of other states but there are still notable deficiencies. The current definition of "refugee" should not be held up as the sole and ultimate frame of reference for claimants simply because of its recognition by the international community.[150] The legislation has provided a workable addendum to the definition, but regulations have not been implemented to broaden access and assure that genuine threats to individual freedom will be viewed objectively by immigration authorities.

Canada's refugee policy remains to a large extent subject to the whims of national foreign policy. Most refugees will continue to be admitted through special relief programs[151] rather than through the rigorous procedures of the *Immigration Act, 1976*. Access to domestic legal processes is not an available option for most uprooted people.

National economic goals dictate Canada's economic strategy. Immigration policy forms a large part of our future economic, manpower, and manufacturing patterns. Normal immigrants are constantly required to measure up to the system of control established through immigration law to suit these industrial strategies. This basic thrust of Canadian immigration policy will not be criticized here, but its application to the question of refugee admission is not appropriate. Criteria of race, politics, or employability would all be contrary to the humanitarian spirit of the inter-

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[150] See Passaris, *Input of Foreign Policy: The Immigration Equations* Int'l Perspectives, Nov.-Dec. 1976, 23, 28.

[151] By virtue of regulations made under s. 115(1)(e) of the *Immigration Act, 1976*, S.C. 1976-77, c. 52.

national conventions. The highly skilled, educated, and trained mainstream immigrant may be the focal point of current immigration philosophy, but refugee admission policy should have a different thrust. The combination of domestic economic considerations and international political alliances serves to make refugee admissions a very selective process. Selection of "suitable" refugees for Canadian purposes may serve a labour-oriented immigration policy but is contrary to the main purpose of the refugee resettlement philosophy. Extraneous factors related to Canada's domestic needs should not be regarded as an acceptable limitation on the eligibility of refugees for admission.[152]

Since the United Nation's Refugee Year in 1959, the world has not seen a significant decline in the number of the homeless and persecuted. Canadian policies certainly are not to be blamed for a failure to resolve this ongoing tragedy. In terms of actual numbers, the record has been good. The admission of Hungarians, Czechoslovakians, Tibetans, Ugandans, and smaller numbers of Chileans, Cypriots, South Vietnamese and others attest to this fact. It must also be remembered that the refugee convention allows each signatory state to establish procedures which comply with its requirements. Canada's recent legislative compliance has been serious and well-intentioned. Continued Canadian support of the office of the United Nations High Commissioner for Refugees has contributed significantly to its much needed international relief programs. Private agencies, such as the National Interfaith Immigration Committee and the Jewish Immigrant Aid Services, have also provided valuable assistance to refugees in Canada and are being heavily relied upon to carry out extensive sponsorship programs under the current legislation. It is not Canada's comparative record or effort which can be criticized.[153]

The theme expressed through international documents such as the United Nations' *Universal Declaration of Human Rights* is the individual's right to freedom of movement and the right to leave any country including his own.[154] Although obviously not respected

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[152] See Dirks, *Canada's Refugee Policy, Indifference or Opportunism* (1978), 252. Dirks tries to resolve the question of why most of our special relief program refugees always seem to be highly skilled and trained.

[153] The evolution of Canada's refugee policy is outlined in Gotlieb, *Canada and the Refugee Question in International Law* (1975) 13 Can. Y.B. Int'l L. 3, 7-11.

[154] U.N. Doc. A/810 (1948), Art. 13. An interesting case on English problems with this concept and the E.E.C. is *Van Duyn* v. *The Home Office (No. 2)* [1975] 3 All E.R. 190 (C.J.E.C.). The effect on this area of the *International*

by all nations, this underlying premise has allowed Canada, as an immigrant receiving country, skilled manpower resources which greatly exceed the expenses of our various foreign aid programs. It would seem that the millions of refugees throughout the world should be able to share significantly in Canadian good fortune. We can afford to be guided solely by humanitarian concerns.

The problems surrounding the admission of refugees to Canada remain to a large extent dependent upon executive prerogative power. Cabinet initiatives are a precondition to any mass refugee admission program. Individual refugees must also be escapees from their country of origin in order to qualify under present definitional criteria and to be eligible for Foreign Branch admission consideration. Away from the watchful eyes of the Canadian judiciary or any domestic adversarial review process, the success of overseas individual refugee applications is subject to potential "despotic consular absolutism".[155] Within Canada the refugee claimant is faced with a complex procedural maze, a heavy onus of proof, and unnecessary secrecy.

Canadian immigration policy seems to be entering a phase of restriction and increased selectivity. Current *projected* immigration levels will see a reduction in the annual immigrant flow as perceived by the regional demographic needs and labour market considerations.[156] The perception of immigrants as a source of na-

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Covenant on Economic, Social and Cultural Rights and the *International Covenant on Civil and Political Rights* (1967) 61 Am. J. Int'l L. 861 and 870 remains to be seen. Generally see Fischer, *supra,* note 5, and Pharand, *Annual Survey of Canadian Law: International Law* (1977) 9 Ottawa L. Rev. 505, 536-52.

[155] See Note, *Judicial Review of Visa Denials: Re-examining Consular Non-reviewability* (1977) 52 N.Y.U. L. Rev. 1137. These terms were originally coined by Profs. Jaffe and Hart in 1952. They said: "[I]t is indefensible to give to any man, acting in secret in a remote land, autocratic power to grant or withhold a privilege of such enormous value as that of entrance to this country": House Committee on the Judiciary, 82d Congress, 2d Sess., *Hearings Before the President's Commission on Immigration and Naturalization* 1575, 1578 (1952).

[156] Minister of Employment and Immigration, *Annual Report to Parliament on Immigration Levels* (Oct. 24, 1978) indicates that the target level for 1979 will be 100,000 persons. Canada is expected to become the new home of up to 50,000 Indochinese refugees within a few years. The program is a major undertaking of the federal government, but relies heavily on the private sector to make it successful. Transportation, housing and health services have been made available. General information can be gathered from Employment and Immigration Canada, *Newsletter, Indochinese Refugees* (1979) vol. 1. Recent information indicates that over 10,000 Vietnamese & Laotian refugees have already arrived: *ibid.,* No. 13 (Oct. 18, 1979), App. I.

tional strength and cultural diversity has become secondary to other issues. Yet immigration procedure deals with many individuals composing a disadvantaged minority — escapees from poverty, lack of opportunity, and persecution who lack language skills, knowledge of institutions, and economic and political power. Immigration policy must also reflect the country's needs. Although rarely comprising the root causes of internal domestic problems, it frequently receives the blame:

> In times of economic or political stress [immigrants] present a ready and defenseless target not only for the demagogues but also for concerned citizens seeking simplistic answers to complex social and economic problems.[157]

It is to the advantage of all concerned parties to refuse to let refugees become a casualty of this debate.

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[157] Roberts, *The Board of Immigration Appeals: A Critical Appraisal* (1977) 15 San Diego L. Rev. 29, 33. Mr Roberts is the retired Chairman of the U.S. Board of Immigration Appeals.